DATUK MAHINDAR SINGH

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, TEMERLOH
KC VOHRAH J
[CRIMINAL APPEAL NO. 51-26 OF 1986]
9 FEBRUARY 1987

CRIMINAL LAW AND PROCEDURE: *Appellant charged under s. 116 of Penal Code, s. 5 of Abduction and Criminal Intimidation of Witnesses Act 1947 - For charge under s. 116, Public Prosecutor's written consent was not obtained - Whether Court should take cognisance of charge under s. 116 - Whether there is a right of appeal in this case.*

The appellant was arrested on 21 April 1986 for two offences under s. 116 of the Penal Code of abetting offences under s. 193 i.e. intentionally fabricating false evidence for purposes of being used in judicial proceedings. The appellant was also arrested for criminal intimidation under s. 5 of the Abduction and Criminal Intimidation of Witnesses Act 1947. The charges were laid before a second class Magistrate.

With regard to abetment charges, no written sanction of the Public Prosecutor was obtained. The Deputy Public Prosecutor agrued that the presence of such officer at a subsequent hearing implies that the said officer has sanctioned. The Counsel for the appellant argued that by virtue of s. 129(i) of the Criminal Procedure Code, no Court can take cognisance of the abetment offences without previous written sanction of the Public Prosecutor, and the complaint of the Court in respect of the offences punishable under s. 193 of the Penal Code committed in or in relation to any proceedings in that Court must also have been made.

Held:

[1] The Magistrate only takes cognisance of the abetment charges:

(a) when the said charges have the previous sanction of the Public Prosecutor; or

(b) the complaint is from the Court where the said offences were committed in or in relation to any proceedings in that Court.

[2] There is no right of appeal in this case and the appeal is accordingly dismissed. However, in exercise of his revisionary powers, the learned Judge set aside the proceedings before the second class Magistrate and the trial Magistrate in so far as they relate to the two abetment charges. This means the Magistrate will proceed to hear the charge under the Abduction and Criminal Intimidation of Witnesses Act 1947.

[3] It is up to the prosecution to decide whether to proceed afresh with the abetment charges, due regard being paid to the requirements specified in s. 129(i)(b) of the Criminal Procedure Code.

[Appeal dismissed.]

Cases referred to:
PP v. R.K. Menon & Anor. [1978] 2 MLJ 152
Hassan bin Isahak v. PP [1948-49] MLJ Supp 179
Pitchaykutty v. PP [1961] MLJ 295

Legislation referred to:
Abduction and Criminal Intimidation of Witnesses Act 1947, s. 5
Criminal Procedure Code, ss. 376, 422, 129, 129(i)(b), 129(ii), (iii), 129(i)(a), 129(i)(c)
Criminal Procedure Code (Cap 21) (Straits Settlement), ss. 139, 448(b)
Penal Code, ss. 116, 193

For the appellant - S. Theivanthiran
For the respondent - Nor Azman, DPP

JUDGMENT

KC Vohrah J:

As I understand from the record of appeal and from what the Deputy Public Prosecutor and Counsel for the appellant have stated from the Bar, the appellant in this case was arrested on 21 April 1986 for two offences under s. 116 of the Penal Code of abetting one Sethu s/o Ramasamy of intentionally fabricating false evidence for the purpose of being used in a judicial proceeding both latter offences being offences under s. 193 of the Penal Code and punishable with imprisonment but which said offences were not committed in consequence of the abetment. He was arrested on two warrants of arrest issued by a Magistrate in respect of these two offences of abetment. He was also arrested on another warrant on the same day for one other offence of criminal intimidation under s. 5 of the Abduction and Criminal Intimidation of Witnesses Act 1947.

With regard to the charges of abetment of the offences under s. 193 of the Penal Code, two complaints in respect of them were laid before a second class Magistrate at Temerloh by a police officer on 17 April 1986. And these complaints were made without the written sanction either of the Public Prosecutor or of a Deputy Public Prosecutor. Nevertheless the Magistrate issued warrants of arrest in respect of both the complaints. Mr. Theivanthiran for the appellant argued that no Court can take cognisance of the abetment of the offences without the previous sanction of the Public Prosecutor in writing. Not only that. He also argued that, additionally, the complaint of the Court in respect of the offences punishable under s. 193 committed in or in relation to any proceeding in that Court must also have been made. He relied on s. 129 of the Criminal Procedure Code as authority for his argument and he relied particularly on subsection (i)(b) of s. 129.

It is pertinent to set out s. 129(i)(b). It reads-

> 129(i) Except in the case of complaints laid by the Public Prosecutor no Court shall take cognisance-
>
> (a) ...
>
> (b) of any offence punishable under s. 193, ... of the Penal Code except with the previous sanction of the Public Prosecutor or when such offence is committed in or in relation to any proceedings in any Court on the complaint of such Court;
>
> (c) ...

Under subsection (ii) of s. 129 it is provided, *inter alia*, that the provision of subsection (i)(b) with reference to the offences named therein apply also to the abetment of such offences or attempts to commit them. Subsection (iii) specifies that the sanction shall, *inter alia*, be in writing.

The opening words of s. 129(i) are clear. The Public Prosecutor may himself make a complaint. If he does so, a Magistrate may take cognisance of any of the offences named in paragraphs (a), (b) and (c) of s. 129(i) or of the abetment of such offence or of an attempt to commit it. No other condition has to be fulfilled before the Court takes cognisance of the offence. The Court can equally take cognisance of the offence where the complaint is made by the solicitor General or a Deputy Public Prosecutor by virtue of s. 376 of the Criminal Procedure Code. Clearly where the complaint is made by the Public Prosecutor (or the Solicitor General or a Deputy Public Prosecutor) it can be inferred that the officer has given due consideration to the allegations of facts constituting the complaint and making out the offence and that he has agreed to the prosecution of such offence.

If the complainant is not the Public Prosecutor (or the Solicitor General or a Deputy Public Prosecutor) then, in respect of the offences named in s. 129(i)(b) and in respect of the abetment of such offences or attempts to commit them, the Magistrate only takes cognisance of such offences in the complaint when, either,

1) it has the previous sanction of the Public Prosecutor (the Solicitor General or a Deputy Public Prosecutor); or

2) the complaint is from the Court where the offence was committed in or in relation to any proceeding in that Court.

With regard to the matter of the sanction, it will be noted that the sanction of the Public Prosecutor(Solicitor General or a Deputy Public Prosecutor) is required to be a "previous" sanction and that it has, *inter alia*, to be in the writing(see subsection (iii) of s. 129), clearly nullifying the argument of the learned Deputy Public Prosecutor that the presence of such an officer at a subsequent hearing of the charges implies that the said officer has sanctioned the prosecution of the offences named in s. 129 of the Code.

In regard to the matter that a complaint has to be made by the Court where the offence was committed in or in relation to any proceeding in that Court, clearly it is not correct, as Mr. Theivanthiran has argued, to say the complaint of the Court has also to be made to support the previous written sanction of the Public Prosecutor (Solicitor General or a Deputy Public Prosecutor). To my mind it is an alternative procedure and applies where the offence complained of was commited in a Court or in a proceeding in the Court. To read otherwise would be to create an absurd interpretation. Take for example the two charges against the appellant of abetting another person of intentionally fabricating false evidence for the purpose of being used in a judicial proceeding. The fabricating of false evidence in a judicial proceeding is an offence under s. 193 of the Penal Code. But the charges against the accused are for abetment under s. 116 where the offences abetted were **not committed** in consequence of the abetment. How then can it be argued that a Court must file complaint of an offence which had not been committed in Court or in a proceeding in Court?

I have left the question as whether there is a right of appeal in this case to the end. And I take this question together with the question as to whether s. 422 of the Criminal Procedure Code applies to this case. It seems to me that there is no right of appeal on the authority of *PP v. R.K. Menon & Anor.* [1978] 2 MLJ 152, the relevant facts of which are somewhat similar to the facts of this case, save that an objection on a point of law in that case was raised after the prosecution had closed its case. I can see no reason for departing from that authority.

But I feel I must act in revision of this case as the objection on a point of law in the Court below was made early in the day before the prosecution had adduced any evidence in the trial and the objection, to my mind, goes to the root of the maintainability of the complaint. I say so in view of the cases of *Hassan bin Isahak v. PP* [1948-49] MLJ Supp 179 and *Pitchaykutty v. PP* [1961] MLJ 295 touching on the non-applicability of s. 422 of the Criminal Procedure Code to cases of this nature. I shall come to these cases later. In any event I also think that where an objection has been taken at the earliest possible opportunity and the objection, though valid, is overruled, it would be difficult for an appellate Court to have resort to s. 422 of the said Code not to set aside the proceedings for want of sanction assuming the provision in s. 422 relating to the want of sanction applies nothwithstanding the decision in *Hassan bin Isahak.*

I now come to the case of *Hassan bin Isahak.* In that case, a Court of three Judges in a Penang Criminal Reference considered, *inter alia*, the requirements of s. 139 of the Straits Settlement Criminal Procedure Code (Cap. 21) now repealed. The said s. 139 is in *pari materia* with s. 129 of the present FMS Criminal Code. The Court held at p. 180 that the want of the prior sanction under s. 139 of the SS Code "deprives the Court of jurisdiction, and any proceedings in such circumstances are a nullity. "The Court brushed aside the submission that s. 448(b) of the SS Code(in *pari materia* with s. 422 of our FMS Code) applied in the case. That section provided that no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of, *inter alia*, the want of any sanction required by s. 139 of the Straits Settlement Code (s. 129 of our FMS Code). Rigby J in the case of *Pitchaykutty* reluctantly felt himself bound by the decision of the Court in *Hassan bin Isahak.* For myself I do not think I can disregard these decisions as, although the provisions interpreted were those of the S.S. Code, those provisions are in *pari materia* with the F.M.S. Code.

As I have stated earlier there is no right of appeal in this case and the appeal is accordingly dismissed. I, however, in exercise of my revisionary powers, set aside the proceedings before the second class Magistrate and the trial Magistrate in so far as they relate to the two abetment charges. This means the Magistrate will proceed to hear the charge under the Abduction and Criminal Intimidation of Witnesses Act 1947.

Needless to say it is up to the prosecution to decide whether to proceed afresh with the abetment charges, due regard being paid to the requirements specified in s. 129(i)(b).

Also found at [1987] 2 CLJ 39